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In the

Supreme Court of the United States

October Term, 1948

No. 131

FLOYD FITZSIMMONS, Petitioner

v.

THE PEOPLE OF THE STATE OF MICHIGAN

On application for certiorari to the Supreme Court of the State of Michigan.

Brief opposing Petition for Certiorari

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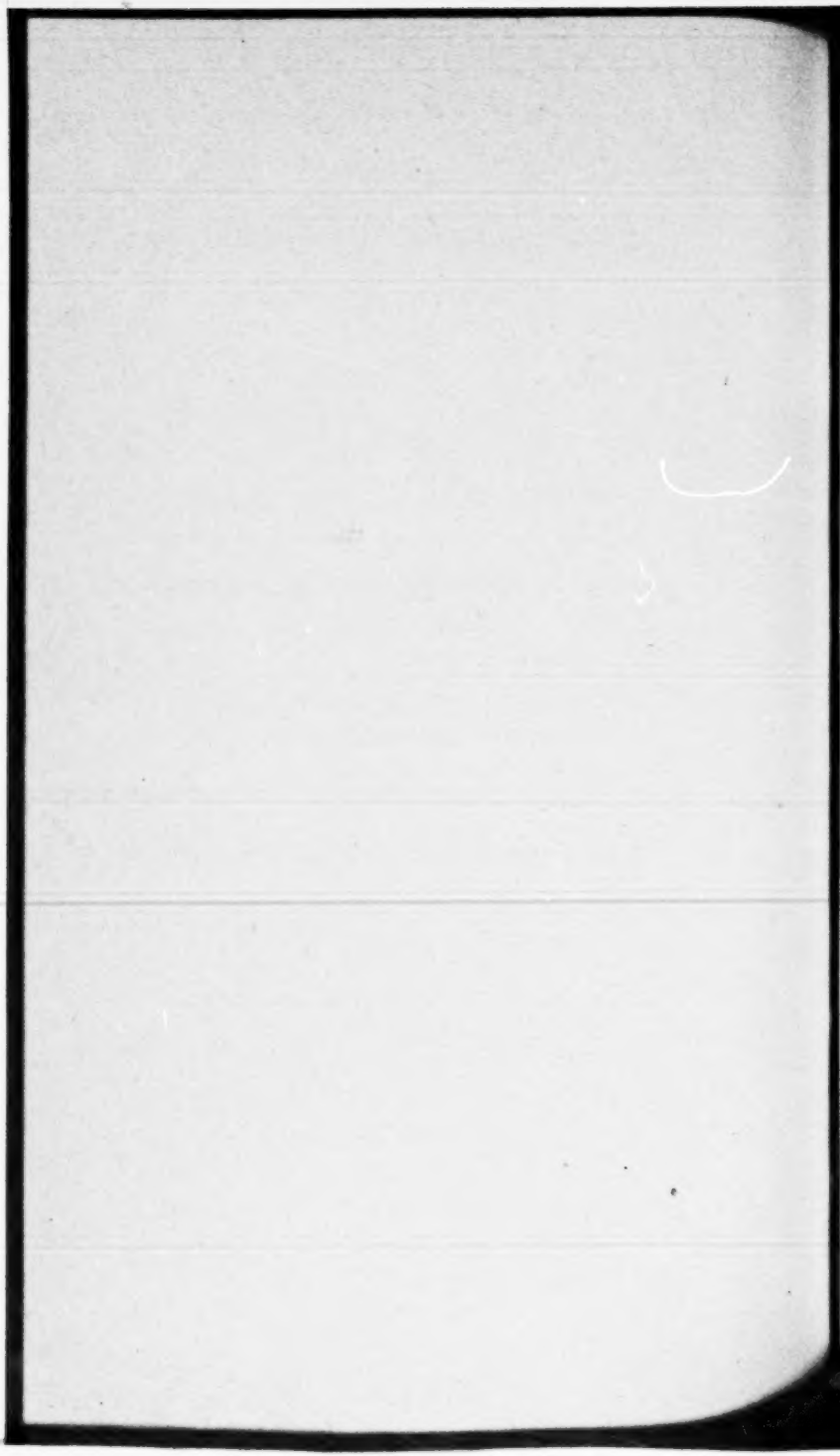

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In the

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I

Opinions of Courts Below.

Counsel are correct in citing the opinion of the court below as *People v. Fitzsimmons*, 320 Mich. 116, and in their statement with respect to the opinions of the trial court.

II

Counter-Statement on Jurisdiction.

1. Since the Supreme Court of Michigan affirmed the judgment of conviction, on the 16th day of February 1948 and denied application for rehearing on the 5th day of April 1948, the petition for certiorari was filed within the time prescribed by law.[1]

2. It is our position: (a) that the trial court followed a valid and adequate course of procedure ordained by Michigan law for testing the qualifications and fitness of prospective jurors and for determining their prejudice or lack of prejudice said to have been engendered by newspaper articles thus affording ample protection for those constitutional rights safeguarded by the Fourteenth Amendment; and since petitioner failed to take full advantage of such procedure, he thereby estopped himself from asserting on appeal that he had been deprived of due process of law when the court of first instance denied his motions for a continuance of the trial; and (b) that the court below rested decision on adequate and independent nonfederal grounds.

3. The denial of petitioner's several motions for a continuance of the trial, for a mistrial, and for a new trial, did not deprive him of a fair and impartial trial and did not constitute a denial of due process of law in violation of Section 1 of the Fourteenth Amendment.

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[1]

28 U.S. C. § 350. See: Department of Banking, State of Nebraska, v. Pink, 317 U.S. 264.

III

Counter-Statement of the Case[2]

We deem it necessary to correct a few inaccuracies and omissions in the statement of the other side,[3] though we follow the three categories into which the matter involved seems to fall.

Our principal objection to petitioner's statement of matters involved, petition, pp. 1-13, is that it is set forth argumentatively, highly colored by assumptions based largely upon lurid newspaper articles.[4]

I. Matters in relation to denial of motions for continuance grounded on newspaper articles.

We invite attention to several inaccuracies, omissions, and irrelevancies in petitioner's statement of the first category of matters involved, *viz.*, the question arising out of the denial of motions for continuance because of al-

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[2]

Numbers in parentheses, unless otherwise indicated, refer to renumbered pages of the record on file in this cause.

[3]

Supreme Court Rule 27, par. 4.

[4]

It is assumed throughout such statement, without proper foundation of record, that the circuit judge who issued the warrant and the prosecuting attorney who tried the cause for the people, together contrived through sensational press releases attributed to them, to deprive the petitioner of his constitutional rights.

leged publicity attendant upon the death of one Warren G. Hooper, a member of the senate of the State of Michigan.[5]

1. We find in petitioner's statement assertions to the effect that the same circuit judge of Ingham county, Michigan, who as a one-man grand jury,[6] after 'taking testimony at secret hearings', issued the warrant authorizing petitioner's arrest, acted also as a magistrate in conducting the preliminary examination,[7] and passed upon defense motions in advance of trial. These allegations, in so far as they imply procedural improprieties or seek to cast aspersions upon the constitutional integrity of such a system, should be disregarded. No affidavit challenging the right of the circuit judge to act in the premises, because of alleged prejudice or bias, was filed; and on review in the state supreme court, petitioner's counsel raised no questions of that nature.

---

[5]

E.g., since no question is raised of the propriety of such procedure, it is irrelevant to emphasize the fact that the circuit judge who issued the warrant after a grand jury investigation, also sat as examining magistrate.

[6]

Michigan Code of Criminal Procedure, chap. 7, § 3 (3 Comp. Laws Mich. 1929, § 17217; Mich. Stat. Ann. § 28.943), et seq.

[7]

Although, as stated in a footnote on p. 2 of the petition for certiorari, the Michigan code of criminal procedure, chap. 7, § 4, has since been amended to prohibit a judicial officer who has conducted a one-man jury investigation, to act as examining magistrate in a case growing out of such an inquiry, this does not mean, nor does counsel contend that the former procedure was constitutionally invalid. The question of propriety was exclusively one of policy for the legislature. And in the absence of a claim of prejudice, formally raised prior to trial, there was no legal objection to such procedure. People v. Butler, 221 Mich. 626; Kolowich v. Circuit Judge, 264 Mich. 668.

2. There are also in petitioner's statement, p. 3, objectionable implications or insinuations that the one-man grand jury and the special prosecuting attorney had something to do 'with the publication of rumors that petitioner was responsible for Hooper's murder'; that the one-man grand jury and the special prosecutor made to the press sensational statements '*calculated* to instil in the public mind a belief that *this petitioner* was one of Senator Hooper's murderers', id., p. 4; that these officers conducted a 'deliberate campaign to prejudice the petitioner, as established by the record herein' and thereby 'created prejudice *per se* which, if it ever could be eradicated, could have been eradicated only by the passage of time', id., p. 7, and that the prosecutor and the one-man grand jury bore the responsibility 'for having created in the public mind a belief that petitioner was guilty of the murder of the alleged principal witness against him', and for 'the flames of public passion'.

There is also some reference to 'a deliberate plan to place this petitioner on trial on a bribery charge while under the aura of a public belief that he was guilty of murder', thus constituting violation of 'fundamental ideas of fair play and justice in civilized society,' id., p. 8.

It may be noted at once that petitioner did not, in either of two motions for continuance (8-12; 20-23), attempt to prove by supporting affidavits or otherwise, that any of the purported statements published in the press were actually made by the circuit judge who acted as one-man grand jury or by the special prosecutor, and that he also failed to establish in his first motion (8-12) the extent of the circulation within the county of Ingham of the specified newspaper articles.

3. There is in the record no substantial proof of any demonstration of public hostility or prejudice against the petitioner, or of attempts to intimidate the jury; and petitioner's motions for continuance, addressed to the discretion of the trial judge, were based exclusively on newspaper articles.

4. During cross-examination of petitioner, the special prosecutor evoked the following testimony (125-127):

> "After the warrant was issued in this case I didn't go down to see Warren Hooper. I passed through and went up to his office. I took a dog-racing bill to him. I told him he had been with me before on that bill and that I was out canvassing and I had a lot of encouragement from some of the boys on the bill.
>
> **Q.** And didn't you also say to Warren Hooper that 'We are getting a little afraid of you?'
>
> **A.** No, sir, I didn't.
>
> **Q.** Didn't you say to Warren Hooper that 'We are getting a little afraid of you?'
>
> **A.** No.
>
> **Q.** And didn't you say to him that, 'Bill Green going to stick?'
>
> **A.** No, I did not.
>
> **Q.** Didn't you make that statement?
>
> **A.** I did not.

The witness then admitted he had seen Hooper twice since his arrest, once to seek his help in obtaining tickets for the World Series baseball games (126).

"**Q.** Did you know him that well?

A. Did I know him that well?

Mr. Gore (defense counsel): I object to the question, and the motive of the question, and move that all questions and answers be stricken from the record for obvious reasons.

Mr. Sigler: If the court please,Warren Hooper was a member of the committee on state affairs.

The Court: It may stand.

Q. . . . Didn't you, on the occasion when you were in Warren Hooper's office, offer to get him a lawyer?

A. I did not.

Mr. Gore: May I have an exception.

A. (continuing): I did not. I did not.

Mr. Gore: (continuing): - - - to this line of questioning, your honor. . . .

Q. . . . Didn't you tell Warren Hooper that you and the boys wanted to get him a lawyer?

A. No. I did not" (127).

We respectfully the foregoing statement as a substitute for that found on p. 8 of the petition for certiorari, in which petitioner argues at length, asserting as facts certain conclusions drawn by him.[8]

5. On pages 3 and 4 of the petition, it is stated that in denying the supplemental motion for a continuance because of the prejudicial effect of the widespread publicity aforesaid, the trial court, after noting that the motion had been ruled upon once by Judge Carr and that he felt, therefore, there was nothing else for him to do but to deny the motion, said (31):

> "I think that the people at the present time do not always take so seriously what they say in the papers and do not pay any attention to it".

The trial judge did make such remarks, but his denial of petitioner's motion for continuance, was based on the following line of reasoning:

> "**The Court**: In the opinion of the court the motion has been ruled upon once by Judge Carr, and I feel that at the present time there is nothing else the court should do but deny the motion.

---

[8]

Counsel argue, p. 8, that the prosecutor saw to it that the jurors' minds were refreshed by deliberately and improperly injecting Hooper's name into this cross-examination, and that such questions (supra) were intended to indicate to the jury that petitioner 'had, shortly before the murder, threatened Hooper's life'; and that it is apparent, therefore, 'that the sole motive in injecting Hooper's name was to prejudice petitioner before the jury and thus deprive him of a fair and impartial trial'. With all due respect and regard for opposing counsel, we cannot agree with their conclusions, a point to be argued in another section of this brief.

Take for example if this murderer of Mr. Hooper was never found, well, then, I suppose, under your argument we could never try the case because there would still be a cloud in their minds.

I tried these cases last summer.[9] It took a week to get a jury, and a large part of the prospective jurors stated here under oath that they hadn't read the articles about the finance companies case, and hadn't seen the papers. In fact, they have made those answers to such an extent that I recall there was a serious editorial in one of the Lansing papers in regard to that matter.[10]

I feel it is a question entirely as to the jurors' answers here in court as to whether or not they can fairly and impartially try this case, or if they have such fixed opinion that they can't set it aside for the testimony that they shall hear in this court. The motion (for continuance) is denied''.

In this connection we would add that the supplemental record containing the *voir dire* examination (243-395), discloses) 245-246) that petitioner's counsel filed a document captioned 'Proposed Interrogation of the Jury', requesting the court to interrogate the jurors respecting their quali-

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[9]

The cases to which the court referred did not involve the petitioner, though they grew out of the same grand jury investigation into bribery and corruption in the Michigan legislature. See e.g., Carl F. DeLano v. State of Michigan, October Term 1947, No. 623.

[10]

The court, be it noted, based his opinion on personal experience in the drawing of juries in similar cases, where the effect of such publicity was highly over-rated.

fications or to permit counsel for the defendant to interrogate them. These proposed were designed carefully to canvass the effect, if any, upon them of newspaper articles reporting the activities of the grand jury, especially any statement purported to have been issued by the special prosecutor or the grand juror-circuit judge which they may have read in the daily press or have heard quoted on the radio, and with regard newspaper articles bearing upon the murder of Hooper.[11] The request was complied with (259 *et seq.*), and the examination disclosed that the majority of the veniremen customarily read local Ingham county (Lansing) newspapers, few read the Detroit papers, and none was influenced by articles appearing therein with regard to the Hooper murder or the case at bar.

6. And finally in this regard we respectfully note that petitioner challenged no juror for cause; that his counsel expressed himself as satisfied with the jury (394); that they made no challenge to the array; and that they assigned (234-242) no error upon any ruling of the court of first instance with respect to the *voir dire* examination.

II. Matters in relation to the denial of further motions for continuance based on change in date of offense.

Petitioner states, p. 9, that 'the warrant issued by the one-man grand jury charged the offense as having been committed on February 20, 1941). The official record (unprinted) shows that such warrant charged the offense

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[11]

The defense 'Proposed Interrogation of the Jury' is in the official record of the court below, though not in the printed record. We published it, without objection, as an appendix to our brief. And, subject to counsel's objection, if any, we republish it here as Appendix A.

to have been committed 'heretofore, *to wit*, on the 20th day of February, A.D. 1941', thus protecting that accusation by a videlicet; and the information used the same language in reciting the date (4).

On page 11 of the petition it is said:

> "Immediately following the special prosecutor's disclosure, in his opening statement, of his intention to change the date charged as the date of commission of the alleged offense, petitioner claimed surprise and moved for an adjournment in order to enable him to prepare his defense to the new charge against him and an opportunity to prepare to be heard in his defense".[12]

To this should be added the following:

(a) The people's witnesses[13] testified with great particularity as to the date of the alleged offense, giving their

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[12]

It may be noted that no denying motion for continuance (45), the trial judge relied in part on § 51, chap. 7, Michigan Code of Criminal Procedure (3 Comp. Laws Mich. 1929, § 17265; Stat. Ann. § 28.991), which provides: 'Except insofar as time is an element of the offense charged, any allegation of the time of the commission of the offense, whether stated absolutely or under videlicet, shall be sufficient to sustain proof of the charge at any time before or after the date or dates alleged, prior to the finding of the indictment or the filing of the complaint and within the period of limitations provided by law: Provided, That the court may on motion require the prosecution to state the time or identify the occasion as nearly as the circumstances will permit, to enable the accused to meet the charge'.

[13]

Gail Handy (56, 68-69, 73, 76), Bert Storey (80-83), and Maurice A. Post (84-86, 90-92).

several reasons for then believing that the event had occurred on the 18th day of February 1941 rather than the 20th day of February 1941 (as some of them had testified at the preliminary examination); and defense counsel were allowed a wide latitude in their cross-examination of these witnesses on the subject, especially in relation to their good faith and that of prosecuting officers.

(b) In objecting to an amendment of the information, to read 'on or about the 18th day of February 1941' in place of 'the 20th day of February' (96), defense counsel stated that the proofs 'took the defendant totally and wholly by surprise, and thereby deprived him of the defense of an alibi which had been legally and duly noticed in this cause', but he agreed (98) 'that time isn't of the essence of the offense charged in this case'.

And he argued that since notice of alibi had been filed, to the effect that the respondent was not in the city of Lansing on the 20th day of February 1941, this constituted an exception to the general rule (that where time is not of the essence of the offense, the time of its alleged commission may be charged under a videlicet).

(c) After the people had rested its case, the defendant Fitzsimmons testified (104-105) he had no idea of his whereabouts on the 18th day of February 1941, unless it was Chicago where he might have been visiting a sick friend, and it was possible he might have been in Lansing.

(d) The court below, in his charge (176), gave the jury the substance, if not the letter, of the respondent's 17th request (161); he told them that in the information, the prosecution had charged the date of the offense to be February

20, 1941; he related that defendant had claimed an alibi for that date, and 'when this case came on for trial, the State for the first time disclosed that it would change the date of the alleged crime from February 20, 1941 to February 18, 1941'; and he then instructed the jury as follows:

> "You have a right to consider that if a person is apprised for the first time on the day his trial commences that the offense is alleged to have been committed on a date different from that charged in the information, it is only reasonable to assume that he will have serious difficulty in recalling his whereabouts on the charged (sic, changed) date".

(e) On February 17, 1945, defendant filed his motion (188-200) for a new trial on the following grounds, *inter alia,*

> "**(4)** That the court erred in denying the motion for a continuance made by the defendant after the opening statement of the prosecution" (188).

> "**(43)** The court erred in denying the motion of defendant's counsel made at the close of the People's case, . . . for a reasonable continuance in order to permit the defendant to prepare for trial on the ground that the amendment allowed by the court changing the date of the alleged offer from the 20th day of February, 1941 to the 18th day of February, 1941 was a surprise to the defendant and deprived him of any opportunity whatsoever to meet and prepare for the changed allegation and completely destroyed the defense of an alibi, which the defendant had duly and legally noticed

and thereby deprived the defendant of a reasonable opportunity to defend himself'' (196-197).[14]

No affidavit was filed in support of defendant's motion for new trial; and defendant did not offer to show that, after the exercise of due diligence, he had succeeded in ascertaining his whereabouts, other than in Lansing, on the 18th day of February 1941.

It would, therefore, appear that petitioner's statement, p. 12, that 'from the facts aforesaid, it is apparent that petitioner was not only prejudiced but actually misled', is in error.

III. Matters in relation to the testimony of the circuit judge who conducted the grand jury investigation and issued the warrant.

We regret our inability to accept counsel's statement of such matters, and we reject it because it is so argumentative. Therefore we would respectfully submit the following counter-statement as a substitute.

The circumstances in which this question arose, may be briefly set forth:

In his opening statement, petitioner's counsel said (51) he would prove that one Gail Handy 'told a different story about . . . this alleged bribe offer under oath, on an occasion in 1941, long before this arrest occurred'.

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[14]

Ground number 56 (199) asserted as a reason for granting new trial, was quite similar.

Gail Handy, a witness for the prosecution, a former member of the Michigan legislature to whom it was charged the defendant has offered a bribe, when recalled by petitioner's counsel for cross-examination (95), was questioned somewhat in detail regarding a statement he had made to the then attorney general in June 1941, but he could not exactly recall it.

The attorney general who filled that office in June 1941, was called (127) as a defense witness and on direct examination (127-128) he testified concerning such a statement. And the statement, read in evidence, appears in the printed record (132-139).

On cross-examination, this witness testified (128) he talked with Fitzsimmons but did not take his statement. There were others called from whom statements were not taken because, in his opinion, it was not necessary. He assisted in handling some of the work of the grand jury at the start.

He could not tell exactly when he told the circuit judge (in charge of the grand jury inquiry), but he did tell him. He was in his office when the witness talked to him, telling him they had thoroughly investigated at a conference and decided it wasn't sufficient evidence to issue a warrant. He told the judge they had taken a statement, but he didn't ask for it so he didn't show it to him.

The witness stated (129): "I didn't believe Handy because he told me three different stories', about the amount of the money offered him.

He took statements from Maurice Post and others, and afterwards at a conference 'it was decided there wasn't

sufficient evidence to issue a warrant'. This conference was apparently not with the circuit judge.

On re-direct examination, this witness testified (130-132) he told the circuit judge the matter had been investigated by two of his assistants and the only investigation he made 'was calling these men in under the statute'. He didn't make any investigation. And 'they recommended that a warrant not be issued because there were so many conflicting stories'.

On re-cross examination, the witness said (132):

> "Based upon the report of my assistants, I didn't think it warranted prosecution. The statement which the defendant's lawyers had he (the witness) had sent to Floyd Fitzsimmons after he had called and asked for it. That was after . . . (the circuit judge) . . . had issued a warrant and he had a perfect right to do it and he would give . . . (the prosecutor) one too if he had asked for it'" (132).

The circuit judge was called by the State as a rebuttal witness and, over objection of defense counsel, testified (151-153) it was not correct that the former attorney general told him about the Gail Handy matter sometime during the months of September, October or November 1943; the attorney general at no time discussed with him or mentioned to him the Gail Handy matter (151); it was not a fact that he talked with him either in the judge's office or in his courtroom in Lansing, Michigan, concerning the fact that he had taken a statement from Gail Handy; nor was

it correct that the attorney general told him he had taken the statement of Loomis Preston, a member of the house of representatives; this matter was not at any time called to his attention.

Handy just appeared before the grand jury in the early part of September 1944, when he was brought in and an investigation made (152-153).

IV

Questions Presented

1. Is there substance to petitioner's claim that in refusing to grant defense motions for a continuance 'due', as alleged, 'to the publicity attendant upon the death of Warren G. Hooper', the trial court denied the petitioner his constitutional right to a fair and impartial trial? And did the court below decide this question on adequate and independent nonfederal grounds?

2. Is there substance to the contention that in refusing to grant petitioner's further motions for continuance on the ground that the prosecution changed the date of the offense in such a manner as to destroy petitioner's alibi, the State denied him due process of law?

3. Did admission of the testimony of the circuit judge who issued the warrant, deprive the petitioner of his liberty without due process of law? Was this question timely raised in its federal aspect, and did the court below so decide it?

V

How questions raised in the Michigan courts.

1. While the federal question of denial of due process with respect to 'I'. *supra,* was raised in the circuit court, before the date set for trial, by motion for a continuance of the trial (8-9), and again at the outset of the trial and before selecting the jury, by a supplemental motion for a continuance of the trial (20, 25-26, 30), it is our position that petitioner later estopped himself from raising the question on appeal.

2. The federal question of denial of due process with respect to 'II', *supra,* was not raised in that aspect in the trial court by motions for continuance of the trial (44-45; 99-100, 154); it was not raised specifically in its federal aspect by motion for mistrial (154-155), although counsel did make such a motion on broad, general grounds (155); and it was raised by motion for new trial (188-190; 196-200).

3. The federal question of denial of due process with rsepect to III, *supra,* was not raised in the court below by application for leave to appeal (213) or by proper assignments of error (241); it was raised too late by application for a rehearing (426-428), and then only in a general way applicable to all claims of error (428).

VI

Summary of the Argument.

First:[15]

1. Petitioner's argument that the widespread publicity attendant upon the murder of Senator Hooper, accompanied by the published inflammatory statements of the special prosecutor and of the grand juror, tending to instil in the public mind the belief that petitioner was responsible for such murder, requiring a granting of the motions for a continuance, and that denial thereof constituted a deprivation of due process of law, rests on unestablished record premises:

a. There is no competent evidence, and there are no allegations of probative force, that the circuit judge and the special prosecutor made any inflammatory statements to the press, tending to instil in the public mind that petitioner was responsible for such murder, or that they made any newspaper statements relating to the Hooper murder.

b. The only basis of petitioner's motion for a continuance of the trial, therefore, was proof of a limited circulation of the Detroit newspaper articles within the cities of Lansing and East Lansing, and not in the outlying communities of the county wherein the jurors resided.

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[15] Point I, petitioner's brief, pp. 19-21.

c. There is no competent and satisfactory evidence of record that the newspaper articles published in the printed record were widely circulated in any Ingham county communities other than Lansing and East Lansing, or that they were read extensively by prospective jurors or to the prejudice of the petitioner.

d. And there is no competent evidence of record that such newspaper articles resulted in manifest public hostility, unfavorable public sentiment or prejudice toward the petitioner; or that their publication culminated in the intimidation of jurors.

2. The court of original jurisdiction, in a permissible exercise of judicial discretion, which he did not abuse, properly held (31) that determination of the question depended entirely upon the test of the jurors' voir dire examination.

3. The petitioner's trial counsel submitted to the court of original jurisdiction, their proposed interrogations of the veniremen, including questions bearing upon the effect of such newspaper articles. The prospective jurors were closely examined along the lines suggested, and they said on their oath that their minds had not been prejudiced by such articles. Petitioner raised no question on appeal based on the voir dire, and he is now estopped from asserting otherwise.

4. The trial court did not abuse discretion in allowing the prosecutor to cross-examine petitioner on his relations with Senator Hooper.

Second:[16]

The refusal to grant petitioner a continuance on the ground that the charge against him was altered (we contend it was not) after a jury had been selected and interrogated with respect to his alibi to the charge set forth in the information, did not constitute a denial of due process. And there is no substance to such a claim:

1. Since time is not of the essence of the offense of bribery set forth in the people's information,[17] under the law of Michigan it was properly charged under a videlicet; [18] and under the law of that State a variance of two days between averment and proof would in ordinary circumstances be considered harmless.[19]

2. A reasonable explanation of the people's witnesses, for miscalculating the date of the offense, as the 20th rather than the 18th day of February 1941, when giving testimony at the preliminary examination, was a matter for the jury

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[16]
Point II, Petitioner's brief, pp. 22-26.

[17]
Petitioner's counsel in the trial court conceded (98) that time is not of the essence of such an offense. See 2 Gillespie, Michigan Criminal Law & Procedure, § 939, p. 1236.

[18]
Mich. Code of Criminal Procedure, chap. 7, §§ 45 and 51 (3 Comp. Laws Mich. §§ 17259, 17265; Mich. Stat. Ann. §§ 28.885, 28.991).

[19]
People v. Saunders, 29 Mich. 269; Turner v. People, 33 Mich. 363; People v. Swift, 172 Mich. 662; People v. Vanderjagt, 235 Mich. 620; People v. Lee, 307 Mich. 743.

in appraising the credibility of such witnesses; and petitioner acquired no vested right in the alibi claimed by him for the 20th day of February 1941, in reliance upon such testimony.

3. Since petitioner failed to support his motion (187-200) for new trial by affidavits showing he had an adequate defense by way of alibi to the new date of February 18, 1941, specified by the prosecutor in his opening statement, charged in the amended information, and established by competent testimony of the people's witnesses, it cannot be said, in the language of the Michigan code,[20] that 'from consideration of the whole procedure . . . that the accused was prejudiced in his defense or that a failure of justice resulted' from the action of the court in refusing a continuance of the trial, or that due process was denied him.

Third:[21]

1. Under Michigan law, the rebuttal testimony (150-156) of the circuit judge who issued the warrant for petitioner's arrest, to the effect that the attorney general who instituted the grand jury inquiry had not informed him of a statement taken by the attorney general prom the petitioner, and in contradiction of testimony (127-139) given by the attorney general as a witness for the petitioner, did

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[20]

Mich. Code of Criminal Procedure, chap. 7, § 76 (3 Comp. Laws 1929, § 17290; Mich. Stat. Ann. § 28.1016).

[21]

Point III, Petitioner's brief, pp. 27-29.

not relate to collateral matters, since testimony bearing on the interest or bias of a witness has never been regarded by Michigan as collateral.[22]

2. Nor is their substance to petitioner's claim that the trial court in admitting such testimony, denied him due process of law.

3. And this question was not timely raised in its federal aspect.

VII

The Argument

Point One

In refusing to grant defense motions for continuance due to the publicity attendant upon the death of Hooper, the court did not deny due process of law.

Counsel for petitioner urge that the refusal of the court of original jurisdiction to grant a continuance constituted a denial of his right to a fair and impartial trial.

Their argument runs something like this: shortly before the trial commenced the grand jury (circuit judge), his staff and others in charge of the criminal investigation, including the special prosecutor, deluged the press with statements designed covertly to convey the insinuation that there was some sinister connection between the murder of Senator

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[22]

See Gillespie, Michigan Criminal Law & Procedure, Vol I, §§ 305, 309, 337, 338, 341, 344, 409, 415, and cases cited.

Hooper and the fact that he was an alleged witness against petitioner in this case; the newspapers published quotations credited to the circuit judge-grand jury and the special prosecutor that Fitzsimmons was guilty of this murder, or at least a likely suspect; they urge that 'public prejudice against the accused had been deliberately fanned by the special prosecutor', brief, p. 10, that 'a violent public prejudice against petitioner was created and nurtured by the special prosecutor', bref, p. 20, that the trial was conducted 'under the influence of a violent public prejudice created and fanned to a consuming flame by the public prosecutor', brief, p. 20, and that the public prosecutor created 'public prejudice of the most extreme character' against a defendant whom he was about to bring to trial.

There are several short answers to the foregoing:

1

Petitioner's argument that in refusing a continuance, the court denied him a fair and impartial trial, rests in part on faulty premises.[23]

1. The record contains nothing of probative value to support petitioner's repeated insinuations that shortly before commencement of trial, and immediately after the violent death of Senator Hooper, the circuit judge who issued the warrant, and the special prosecutor, in order to bring about the conviction of the petitioner on a charge of offering a bribe, deliberately planned a campaign of prejudice against him through the instrumentality of the public press, or that

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[23]

Please see our counter-statement of the case, clearing indicating such faulty premises.

either of them made statements to the press intimating that petitioner had a part in the Hooper slaying.

2. The only foundation, therefore, of the defense motions for continuance, was proof (22-23) of a limited circulation of three Detroit newspapers in the cities of Lansing and East Lansing.[24]

Affidavits (22-23) filed in support of appellant's supplemental motion for a continuance, show that the combined *daily* circulation of the three Detroit papers in Lansing and East Lansing for the six months preceding the 26th day of January 1945, was 11,400, while their *Sunday* circulation was 28,000.[25]

Moreover, the papers attached as exhibits (12-13) were those published in the two cities between the 12th and 17th days of January, inclusive (6 days), approximately six of which were circulated on Friday and Saturday, the 12th and 13th, and only two on the one Sunday, the 14th day of January. And there was no proof of the extent of the circulation of the Lansing local paper.

Viewing such limited circulation in its relation to the population of Lansing and its neighboring municipality, and considering petitioner's failure to prove that the news-

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[24]

This, we think, is important because of the Michigan rule that mere newspaper publicity is an insufficient ground for granting a continuance or change of venue. People v. Swift, 172 Mich. 473; People v. Burns, 242 Mich. 345; People v. Connors, 251 Mich. 99, 103; People v. Raider, 256 Mich. 131; People v. Schneider, 309 Mich. 158.

[25]

Lansing's population, according to the 16th Census for 1940, was 78,753, East Lansing, 5,839; combined: 84,592.

papers were circulated in the outlying townships and villages of Ingham county, it would not be a fair inference that members of the jury panel called to serve in this case were prejudiced by the articles in question, or that the articles in question aroused a public hubbub.[26]

Certainly, aside from the newspaper articles, the trial court had absolutely nothing else before him to evidence manifest public hostility, unfavorable sentiment or prejudice against petitioner; or that the members of the jury panel had been intimidated.

2

On recognized principles as well as under Michigan law, the trial court did not abuse discretion in denying petitioner's motions for continuance and, in holding that the question of prejudice must depend upon the result of voir dire examination of veniremen, he did not deny due process of law.

1. While it is axiomatic on well-established principles of universal application, that a continuance of trial should be granted when it appears that conditions are such relative to hostile public sentiment and prejudice that the State or the defendant cannot at that time obtain a fair and impartial trial, the denial of such an application has by the majority of courts been deemed an abuse of discretion *only* when a strong showing has disclosed beyond shadow of doubt that public feeling is running high to the great prejudice of the accused person. The merely sensational press

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[26]

On January 29, 1945, with VE Day over three months away and the War approaching its climax, it is possible that newspaper readers were interested in matters other than murder mysteries.

coverage of an unsolved murder is not sufficient, we think, to justify a postponement of trial unless there is further evidence of actual public hostility.

The following examples will illustrate the point:

Thus, it has been held, a continuance of trial should be granted where the directors of a bank or banks which have suspended specie payment are about to be tried in a community greatly excited over the banking situation, especially over the plight of the individual members of the locale;[27] or, as the supreme court of Michigan has decided, a change of venue should be ordered in an embezzlement case where failure of the bank involved has caused much excitement and public indignation among the depositors, and where the case itself has become one of the important issues of an election campaign for the office of prosecutor;[28] or where wide publicity and public interest has been aroused in a grand jury inquiry involving tax frauds, such investigation having widened to a point where it became a political issue of a state political campaign, thus serving to arouse public indignation and create a situation not conducive to a fair and impartial trial in the county;[29] or where a mayor and councilman charged with

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[27]

Commonwealth v. Dunham, Thacher Crim. Cas. (Mass.) 516.

[28]

People v. Gage, 188 Mich. 635, in which the court observed that on the eve of an election, circulars and dodgers relating to the case were distributed by the then prosecuting attorney, assuring the public that Gage could be convicted at home for less than $500; and that the campaign discussion of this particular case became so personal, bitter, and acrimonious as to result in a libel and slander suit involving interesting counsel which furnished sensational press copy.

[29]

People v. Nathan, 249 N.Y.S. 395; 139 Misc. 345.

diverting tax funds, were deemed entitled to a change of venue in view of the publicity given the case and of local taxpayers' interest;[30] and it is good ground for continuance where it is established that known prejudice and ill feeling towards a prisoner extends over a large portion of the county, owing to his agency and service in behalf of certain persons claiming the lands of many residents of such county by superior title, and about which there is much unsettled litigation is pending.[31]

It will be noted that in each instance cited, public prejudice, hostile sentiment and excitement grew out of the self interest of bank depositors, taxpayers, or land owners threatened with eviction, and not out of mere newspaper articles. The distinction is that in such cases, public hostility towards the accused was reflected in sensational newspaper articles; in the case at bar, the senational press coverage of a murder did not reflect public indigation or report its manifestations.

> "People in this country do not take for truth, everything that is published in a newspaper. The jury well know that they are to be governed only by the evidence and the law".
>
> *State v. Norris,* 2 N.C. 429; 1 Am. Dec. 564.[32]

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[30]
People v. Frankel, 266 N.Y.S. 360.

[31]
State v. Manns, 48 W. Va. 480; 37 S.E. 613.

[32]
Annotations on the subject will be found in: State v. Gordan, 32 N.D. 31; 155 N.W. 59; Ann. Cas. 1918 A, 442, at p. 449;—State v. Rasor, 168 S.C. 221; 167 S.E. 396; 86 A.L.R. 1237, 1249.

2. So far as Michigan is concerned, the question is controlled in part by a statute of that State,[33] giving the trial of criminal cases precedence over all other litigation and providing, among other things, for the adjournment of such causes only for good cause shown.

Such provisions, however, merely declared the long-established Michigan rule that the postponement of a criminal trial lies within the sound discretion of the court; that the burden is on the party claiming abuse of discretion to show it; and that prejudice to a defendant in a criminal prosecution must be apparent or proved to have been at least probable.[34]

3. The trial court, as we have seen, in denying the supplemental motion for continuance (31), followed another Michigan rule of procedure, firmly embedded in her jurisprudence by numerous decisions of her highest court, when he said:

> "I think it (whether jurors would be prejudiced by newspaper articles on the Hooper murder) is a question entirely as to the jurors' answers here in court as to whether or not they can fairly and impartially try this case, or if they have such fixed opinion that they can't set it aside for the testimony that they shall hear in court".

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[33]

Mich. Code of Criminal Procedure, chap. 8, § 2 (3 Comp. Laws 1929, § 17295; Mich. Stat. Ann. § 28.1025).

[34]

People v. Williams, 118 Mich. 692;
People v. Burby, 218 Mich. 46;
People v. Crawford, 218 Mich. 125;
People v. Raider, 256 Mich. 131;
People v. Schneider, 309 Mich. 158.

That rule is that on application for a continuance, or a change of venue, or similar relief, the better practice is for the trial court to make an actual test by an effort to secure a fair jury.

People v. Swift, 172 Mich. 473, 481;
People v. Burns, 242 Mich. 345, 350-351;
People v. Raider, 256 Mich. 131, 134;
People v. Schneider, 309 Mich. 158, 163, 165.

In *People v. Swift, supra,* in holding that the trial judge did not abuse his discretion in denying a motion for change of venue, the Michigan court said, among other things:

> "It was proper and lawful for him to defer final determination of the motion until after the examination of the jurors in the case as to their qualifications, and if a fair and impartial jury could be obtained, as appears to have been the result, it is held that this may justify denying the motion, even though other facts apparently entitling the accused to its being granted may have been shown, for the actuality of the main fact 'demonstrated the possibility of its existence'. 12 Cyc. p. 249, and cases cited. It has even been held that a failure, or delay, or difficulty in obtaining impartial jurors is not conclusive in such a case. But that does seem to have occurred here. . . . . *We are not advised how many jurors were excused in this case, or the nature of their preliminary examinations* . . . . . It is difficult, and often impossible, for appellate courts to see matters as they actually existed and appeared on the trial to the presiding judge, and that should not be overlooked in passing upon a question of the proper exercise of discretion. We are not prepared to say that there was an abuse of discretion in this instance".

In *People v. Burns, supra,* the situation was converse, the respondent appealing from conviction of a criminal offense, on the ground that the court erred in granting the State a change of venue upon affidavits filed by the prosecuting attorney in support of his contention that the people could not have a fair trial in the county. The court held that the trial court did not abuse its discretion, although counter affidavits filed by defendant supported his contention that a fair trial could be had.

The court said, in part,

> "(pp. 350-351) To determine a question of such importance upon evidence by affidavits is never satisfactory.[35] A better practice would be for the trial court to make an actual test by an effort to secure a fair jury. Such a course is not absolutely essential, but it is the surest way of protecting the rights of both parties. However, the question is addressed to the judicial discretion of the trial judge, and except for an abuse of that discretion we have no right to review his ruling".

In the case of *People v. Raider, supra,* the court held (syl. 4, and 256 Mich. at 134) that the arrest of witnesses charged with perjury in the trial of defendant's companion in crime, who was tried separately,[36] and the resulting publicity given thereto in newspapers, would not necessarily result in prejudice to defendant, and, in absence of showing that it came to attention of jurors, there was no

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[35]

In the case at bar, claimed evidence of prejudice consisted of newspaper articles, affidavits as to their circulation, and the affidavit of counsel based on hearsay and his opinion.

[36]

People v. Keywell, 256 Mich. 139.

abuse of discretion in denying defendant's motion for continuance until the perjury cases were tried.

The court said, *inter alia,*

> "The *voir dire* examination of the jury is not in the record. There was no showing that the arrests and charges came to the attention of the panel".

And, finally, in the latest decision of the Michigan court, *People v. Schneider* (1944), 309 Mich. 158, counsel for defendant moved for an adjournment because of the proximity of the date of trial to the date of a newspaper article and editorial. There, at the request of the trial court, all members of the jury were questioned in their *voir dire* examination with regard to such articles, and all denied any prejudice as a result of reading or hearing about the articles. The motion for adjournment was denied. Defendant appealed and complained that he was not accorded a fair trial by reason of the trial having taken place so soon after publication of such articles.

The court first noted, p. 163, that before the jury was selected the trial judge stated he would not proceed with the trial if they could not get a jury of 12 people who were fair and impartial, but first he wanted to find out if 'we can or whether he can't' (sic).

The court also observed the record showed 'there was no challenge to the array, no motion for change of venue', and, after discussing the cases cited above, said (p. 165):

> "In the case at bar, defendant's counsel having announced that he was satisfied with the jurors selected, after the jurors had been questioned concerning their fitness to sit as jurors in this particular case, we find

no abuse of discretion on the part of the trial court in denying a motion for a continuance".

In the case of *Schneider, supra,* the court also said:

> "Newspaper reports are ordinarily regarded as too unreliable to influence a fair-minded man when called upon to pass upon the merits of a case in the light evidence given under oath; and it is now a well-settled rule that a juror, although he may have formed an opinion from reading such reports, is competent if he states that he is without prejudice and can try the case impartially according to the evidence, and the court is satisfied he will do so". From 24 Cyc. p. 298.

4. We respectfully invite special attention to a federal case which dealt with practically the same problem,

> *Allen v. United States,* CCA 7th, 4 F 2d 688, 695-698, headnote 17; certiorari denied, 267 U.S. 597, 598, and 268 U.S. 689.

Mary Allen and others were convicted of conspiracy to violate the National Prohibition Act and, on error, the judgment was affirmed.

The night before the trial began, one of the principal witnesses for the government, an alleged accomplice, was shot and killed. In view of the articles appearing in newspapers, certain defendants sought a continuance, a change of venue, and dismissal of the jury panel.

Almost simultaneously with the report of the murder of the government's witness, there appeared what reported to be the district attorney's views of the murder, and a statement of what he intended to do to prevent intimidation of government witnesses.

The injury of which defendants complained, on appeal, was due to (a) the charge or insinuation that the defendants were responsible for the murder of the chief witness of the government; (b) the action of the district attorney in giving false and misleading information to the newspapers.

The circuit court of appeals in affirming held that refusal of continuance, change of venue, or new panel, on the ground of alleged prejudice arising from the newspaper reports of the murder of one of the government's principal witnesses, was not error.

The court's decision rested on the following consideration: (1) the articles appeared before the jury was drawn, and the jurors were fully examined in respect to their qualifications, and with reference to these murder stories, but the voir dire examination failed to disclose prejudice; (2) counsel for the defense did not exhaust their peremptory 'strikes', and challenged no juror for cause because he had read such articles; (3) jurors are not disqualified, though they have heard something of the facts through the newspapers; and (4) one could not read the testimony of the 12 men given on the voir dire without being satisfied that they entered upon the trial of the case uninfluenced by the newspaper articles.

And the court concludes:

> "This presents a different situation from one which arises where a prejudiced or highly inflammable newspaper article reaches the jury after the case has begun, or when the jury is deliberating upon its verdict. In most of the cases cited by defendants, the sensational newspaper articles appeared after the jury was drawn. There was no opportunity for the court to ascertain whether any juror had been prejudiced. Even under

> such circumstances, the granting of a continuance is largely a discretionary matter with the trial judge. In the present case, we cannot say there was any abuse of discretion".

The case of *Allen* was followed by the circuit court of appeals (7th) in

Paschew v. United States, 70 F. 2d 491,

holding that where the record does not disclose whether any of the jurors had read or heard of particular newspaper articles, it could not say that discretion had been abused in denying a similar motion.

As the North Dakota supreme court expressed it, in

State v. Gordon, 32 N.D. 31; 155 N.W. 59; Ann. Cas. 1918A 442, 447,

> "Anyway, even after the motion for a continuance had been denied, the defendant had the opportunity to challenge the panel and to show prejudice of the jurymen on the *voir dire* examination; and, there being no showing that an impartial panel or impartial talesmen could not have been obtained, or in fact, that any of the jurymen were in fact disqualified, we must hold that the defendant had abundant opportunity to protect his rights; that there was no showing of prejudice; and that the trial judge did not abuse his discretion in overruling the motion".

We respectfully submit, therefore, in the light of the foregoing authorities, that the trial court did not abuse his discretion in denying continuance of the trial, and that in following the accepted doctrine of the supreme court of the State of Michigan, he did not deny due process of law.

3

Since petitioner's counsel did not in the trial court or on appeal to the court below, claim that the voir dire examination disclosed prejudice on the part of jurors, and since they expressed satisfaction of the jury at the close of such voir dire examination, he should be estopped from asserting this point.

The record indicates that when petitioner's motion for continuance was denied (31) on the ground that the question depended on the outcome of the *voir dire* examination, the jury was interrogated and impanelled upon the information as filed in the cause, together with the several facts set forth in the notice of alibi theretofore filed in behalf of the respondent.

In the midst of the special prosecutor's opening statement (33-46), defense counsel moved (45) the court to discharge the jury and grant a continuance in order that they might prepare for the 'new issues' injected by the special prosecutor.[37] This motion was denied (45-46); counsel for respondent proceeded with his opening statement (46-52); and the first witness for the people was sworn and testified (52-55).

Quite definitely, then, counsel for the defense did not renew his motion for a continuance on the ground of prejudice or public hostility, based on the *voir dire* examination, and the fair inference is that the jurors who were examined, and who tried respondent, were not so prejudiced.[38]

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[37]

This motion for continuance, based on a different ground, is involved 'Question II'.

[38]

People v. Schneider, 309 Mich. 158.

So far as the record goes, counsel were satisfied with the jury, at least nothing to the contrary appears.

After the people had rested its case, the special prosecutor moved (96) to amend the information in respect of the date of the alleged offense; whereupon, after considerable argument (96-99), defendant's counsel again moved (99) for a continuance 'in order to permit defendant to prepare for trial', and contended this should be granted because of the amendment. The motions having been argued (99-102), the court denied them (102).

Again, be it noted, defense counsel did not renew their motion for continuance on the ground that the jurors were prejudiced by newspaper articles, or that the public was hostile to the accused.

So, too, when at the close of the case, counsel renewed their motion for a continuance on the ground that the change of date had surprised them, they did not renew the motion on the grounds now asserted on appeal (154-156).

After conviction, on motion for new trial (188-200), counsel contended (199) that the court erred in denying defendant's motion for a continuance made before the opening of the trial (reason and ground 55), but they made no mention of the *voir dire* examination or its result.

And while they assigned error (234-235) on the denial of the motions of January 17 and 29, 1945 (those involved in this question), and on the denial of their motion for new trial, they predicate no claim of error on the *voir dire* examination.

Nor did the defendant challenge the array of jurors, or file motions for a change of venue.

We, therefore, respectfully submit they are not in a favorable position to claim that their client suffered prejudice by the denial of such motions for a continuance.

Moreover, we respectfully submit, the court below in following and upholding well-established Michigan law, rested its decision on adequate and independent nonfederal grounds.

Point Two

There is lack of substance in petitioner's contention that the trial court in refusing to grant his motion for continuance on the ground that the prosecution changed the date of the offense in such a manner as to destroy petitioner's alibi, denied him due process of law.

Petitioner contends, brief, pp. 22-26, that the refusal to grant him a reasonable continuance where (when) the charge against him was altered after a jury had been selected and interrogated with respect to his alibi to the original charge, constituted a denial of due process. And their rest their argument on the constitutional principle exemplified by this Court in several decisions,[39] that a person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence'.[40]

The argument is based upon the following alleged premises: that the warrant and information charged the offense

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Snyder v. Massachusetts, 291 U.S. 97; Carter v. Illinois, 329 U.S. 173; In re Oliver ,333 U.S. 257.

[40]

In re Oliver, supra.

as having been committed on the 20th day of February 1941; that witnesses for the people, when testifying at the preliminary examination, fixed the date as the 20th day of February; that in reliance on the date charged in warrant and information, and in reliance on the testimony of such witnesses, the appellant filed notice of alibi for the 20th day of February; that the prosecution knew of the change in date at least a week before the trial, and did not notify the defense counsel until he made his announcement in court (43-44); and, it is said, appellant was unable to state where he was on February 18, 1941, (the changed date) unless he was in Chicago (104). He had never offered Handy $500 or any other sum on February 18th or February 20th or at any other time (104). Relying on the charged date of February 20, 1941, the only date he was called upon to meet, he had only prepared his defense as to his whereabouts on that day (103-104).

Counsel further argue that the people's motion to amend the information by changing the date from February 20th to February 18th, took his client totally and wholly by surprise and thereby deprived him of the defense of an alibi which had been legally and duly noticed, (96).

The State's position, shortly stated, is this: (1) the date of the offense was properly charged under videlicet and there was no fatal variance; (2) it was for the jury to say whether the change in testimony relating to such date, had been reasonably explained; and defendant had no vested right in his alibi; and (3) the appellant, in the long run, suffered no prejudice. The latter, we think, is the controlling point.

1

The date of offense was properly charged under a videlicet, and a change from February 20 to February 18 was not a fatal variance.

'We are all agreed', conceded counsel for respondent (98), 'as to the law covering this proposition that time isn't of the essence of the offense charged in this case.'

Such being the case, the question is controlled largely by statute.

> "**Sec. 45.** The indictment or information shall contain: . . . . . 2. The time of the offense as near as may be but no variance as to time shall be fatal unless time is of the essence of the offense". Code of Criminal Procedure, chap. 7, § 45 (3 Comp. Laws 1929 § 17259 [Stat. Ann. § 28.985]).

> "**Sec. 51.** Except insofar as time is an element of the offense charged, any allegation of the time of the commission of the offense, whether stated absolutely or under a videlicet, shall be sufficient to sustain proof of the charge at any time before or after the date or dates alleged, prior to the finding of the indictment or the filing of the complaint and within the period of limitations provided by law: *Provided,* That the court may on motion require the prosecution to state the time or identify the occasion as nearly as the circumstances will permit, to enable the accused to meet the charge". *Idem.,* § 51 (3 Comp. Laws 1929, § 17265 [Stat. Ann. § 28.991]).

This latter provision of the code, was applied by the Michigan court to an analagous case,

People v. Whittemore, 230 Mich. 435, 437,

where Mr. Justice Wiest said:

> "The information alleged the crime (of statutory rape) was committed 'on or about the 28th day of August, A.D. 1923', and defendant claims there was error in not confining the prosecution to that particular day. He claims he came to trial prepared to and did establish his presence elsewhere the day alleged and he should not have been called on to meet the charge on any other day. The occasion charged was specific, and the court was not in error in letting the act charged, and not a particular day alleged under *videlicet* govern. A *videlicet* avers a date tentatively, and unless a particular day or date is essential to a crime there is no variance of the evidence shows that the very crime charged was actually committed on a different date (citing earlier cases)".[41]

Certainly it cannot be said that a variance of two days, is necessarily fatal.

2

It was for the jury to say whether the change in testimony relating to such date, had been reasonably explained; and appellant had no vested right in his alibi.

But, it is argued, the people's witness testified on preliminary examination, fixing the date of commission of the

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[41]

See also: People v. Flock, 100 Mich. 512; People v. Vanderjagt, 235 Mich. 620; People v. Schultz, 238 Mich 15; and People v. Jones, 308 Mich. 43.

offense as February 20, rather than the 18th; the prosecution knew at least one week before commencement of trial, that this witness was going to change his testimony; appellant relied on the date fixed at the preliminary examination, and he gave notice of alibi; therefore, in one way or another, appellant was tricked out of the benefit of his alibi.

So far as that goes, the petitioner's counsel had ample opportunity to test the credibility of the witness on cross-examination, and to draw from him an explanation of the change in his testimony. And he was not denied the privilege of arguing the matter to the jury.

The explanation given was reasonable (see our counter-statement of the case).

And it requires no citation of authorities, to demonstrate the simple proposition that an accused person acquires no vested right in a notice of alibi.

Furthermore, when instructing the jury, the court honored the defendant's 17th request to charge (161), for, after directing their attention to the change in date, he said:

> "You have a right to consider that if a person is appraised for the first time on the day his trial commences that the offense is alleged to have been committed on a date difference from that charged in the information, it is only reasonable to assume that he will have serious difficulty im recalling his whereabouts on the charged (changed) date".

It remains to consider, then, whether the court's denial of respondent's motions for a continuance on this ground, was harmful or prejudicial to the respondent.

3

The petitioner, in the long run, suffered no prejudice.

As appears from our counter-statement of the case, the respondent took the stand in his own behalf (102-127) and in his testimony was unable to say where he had been on the 18th day of February 1941; he might have been in Chicago, or he might have been in Lansing that day (104-105).

Over two weeks later, on February 17, 1945, petitioner filed a motion (187) for new trial, and alleged that the court had erred in denying him a continuance when appraised of the change in date. But he did not support his motion by an affidavit showing prejudice, or that he had an adequate defense of alibi with respect to the new date, nor has he at any time informed the court of his whereabouts on the 18th day of February 1941; and there is no assurance whatsoever that in the event of a new trial, the respondent would be in position to establish an alibi for that date.

This brings petitioner squarely within the provisions of § 76 of chapter 7 of our Code of Criminal Procedure (3 Comp. Laws 1929, chapter 7 of § 17290 [Stat. Ann. § 28. 1016]).

The foregoing section of the code, as far as applicable, entitles an accused to a reasonable continuance 'if any amendment be made . . . to cure a variance between the indictment and the proof 'unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by . . . the variance . . . of that his rights will be fully protected by proceeding with the trial or by a postponement thereof to a later day with the same or another jury'.

But its concluding sentence limits the right to a review of denial of such a postponement of continuance:

> "No action of the court in refusing a continuance or postponement under this section shall be reviewable except after motion to and refusal by the trial court to grant a new trial therefor and *no writ of error or other appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court shall find that the accused was prejudiced in his defense or that a failure of justice resulted*".

This rule, whether statutory or judicial, is not peculiar to Michigan, for this is clearly indicated in at least two decisions of sister states, cited in appellant's brief p. 37, *viz.*,

People v. Kircher, 333 Ill. 200; 164 N.E. 150;

Williams v. State, 48 Tex. Cr. Rep. 325; 87 SW 1155.

Thus, in the *Williams* case, it is held that where the state elects to prosecute for an offense committed on some date other than that alleged in the information, in order to procure a continuance on that ground accused must show that he has a defense against the date selected by the state.

And in the Illinois case, *supra*, the trial court granted the respondent approximately two days for preparation to procure witnesses who would know of his whereabouts on February 1, the new date selected for proof by the prosecution (in place of January 25, the date charged in the indictment). The court said:

> "No new facts were alleged on renewal of the motion after the time allowed by the court and no statement

> of efforts to obtain witnesses was set out on the renewal of the motion nor any allegation of the absence of witnesses made. . . . Under the circumstances shown in the record we are of the opinion that the court did not err in confining the additional time for preparation to a period of two days".

The defendant at bar had at least two days, and possibly three (Jan. 29 to Feb. 1, see calendar entries, p. viii), after he learned of the change of date, to ascertain his whereabouts on the 18th day of February. But when he renewed his motion for a continuance, he alleged no new facts and stated no efforts to obtain witnesses. Nor was he able to show prejudice when he moved for a new trial (187-200) some 16 days after conviction. And he has not yet offered to prove an alibi for the new date.

We, therefore, respectfully submit the court below did not commit prejudicial error when he denied defendant's several motions for a continuance, nor did he deny due process.

Point Three

Permitting the circuit judge who issued the warrant, to testify as a rebuttal witness for the people at the close of the case, did not constitute a denial of due process, and there is no substance in the claim.

The circumstances in which this question arose are set forth in our counter-statement of the case, part III.

The rules of law on which appellant relies, are, of course, to be conceded (only, they do not apply to this particular case).

We fully realize that under Michigan law cross-examination may not be extended into collateral matters for the purpose of eliciting answers (as to matters *irrelevant* to the issue) which may later be contradicted and thus discredit the witness,

Gillespie's Mich. Criminal Law and Procedure, Vol. I, § 305, pp. 356-357;

People v. Farrell, 137 Mich. 127; 146 Mich. 264;

People v. Seaton, 235 Mich. 698;

but, questions on cross-examination affecting the *weight* of a witness' story should not be abridged,

People v. Sullivan, 290 Mich. 414 (syl. 7).

We are also aware of the rule that a party who raises a *collateral* issue on cross-examination of a witness is bound by his answers (Gillespie, Id. § 309, p. 364),

People v. Barrette, 233 Mich. 615.

"It is not proper to contradict, or impeach, on *collateral* matters brought out on examination, but, where permitted, it does not constitute reversible error",

Gillespie, Id. Vol. I, § 309, pp. 361-362;
citing:

People v. Tice, 115 Mich. 219;

People v. Baxter, 245 Mich. 229;

Cf. *People v. Hillhouse,* 80 Mich. 580.

Counsel, it should be noted, are bound by answers on 'collateral' matters, because such inquiry would open *'irrelevant issues'* (Gillespie, *Id.,* Vol. I, § 337).

There are, however, exceptions to the general rule above stated.

In § 344 of his work, Judge Gillespie indicates what courts have considered 'collateral matters': e.g., particular traits of character, the commission of particular wrongful or immoral acts, the commission of certain crimes, whether a witness ran a saloon without a license, whether he has been criminally intimate with a certain person, whether he swore falsely on a certain occasion; or the witness may be interrogated as to his occupation or vocation, habits, or associates; and a female witness may be asked whether she is a prostitute, is living in adultery, or is or has been the kept mistress of a particular man, or has had illegitimate children, or has kept girls for the purpose of prostitution'. These matters are so obviously collateral, it is not difficult to understand their classification.

Judge Gillespie *(Id.,* Vol. I, § 341, p. 404) states the notable exception on which we rely in the pending cause:

> "Where a witness is cross examined on collateral matters, the untruthfulness of his answers cannot be shown by other witnesses, but interest or bias of a witness has never been regarded as collateral. Such matters go directly to his credit, and must determine with the jury how far his evidence is to be regarded as proven. The administration of justice would be very defective if a witness could, without contradiction, make himself out impartial and disinterested, and run no risk of exposure", citing:
>
> *Geary v. People,* 22 Mich. 220.

A few illustrative cases will suffice to point our argument that rebuttal testimony of the circuit judge, was admissible

in evidence to show the bias and interest of the former attorney general:

Geary v. People, 22 Mich. 220 (Syl. 2), holding that 'when a witness, on cross-examination, denies having made statements which disclose an interest in the result of the trial, it is competent that such statements were actually made'.

Hamilton v. People, 29 Mich. 173, 183-184 (Syl. 13), holding: evidence that witness had been active in procuring testimony, may be received to impeach him when he has denied it on cross-examination.

People v. Millard, 53 Mich. 63, 68 (Syl. 6), holding that a woman who has testified to the guilt of a man on trial for killing his wife had tried to get a place in his household after the wife's death, is admissible for her impeachment.

Tolbert v. Burke, 89 Mich. 132 (Syl. 3), holding where a witness denies making a statement which, if made, tends to show his interest or bias, the party making the inquiry may show that the statement was made.

Electric Co. v. Grant, 90 Mich. 469, 475 (Syl. 3), holding that testimony which touches the bias or interest of a witness is always admissible, and can be shown on his cross-examination, and, if denied by him, can be proven on rebuttal, if the proper foundation is laid for such proof.

In *People v. Row,* 135 Mich. 505, 508 (Syl. 5, 6), it was claimed by respondent on his trial for statutory rape that it was physically impossible for him to commit the offense at the time charged; that he had paralysis, and was under

treatment for paralysis by a physician, who informed him he had that disease. The physician testified that he treated respondent for rheumatism and not for paralysis, and denied having made statements to several persons that respondent had paralysis.

The Court (135 Mich. at 508):

> "For the purpose of impeaching the doctor, these persons were called, but, as the judge thought the inquiry related to a collateral matter, they were not allowed to testify. We think the testimony should have been admitted. What we have said about this offer to impeach the witness in this respect also applies to the offer to show that the witness had attempted to persuade persons not to go upon the bond of the respondent, as showing his interest or bias".

In *McCloy v. Vaughan*, 185 Mich. 189, 198 (Syl. 2), the Court said, among other things:

> "The interest or bias of a witness has never been regarded as irrelevant. It goes directly to his credit, and may be considered by the jury in weighing their testimony".

And see:

> *People v. McCullough*, 281 Mich. 15, 26, where the Court, in collating its former decisions defining the latitude of cross-examination, especially on collateral matters, adheres to the same rule, as announced in Geary v. People, supra, 22 Mich. 220.

We, therefore, respectfully submit that the testimony of the former attorney general related to relevant facts and

not to collateral matters; that as a witness for respondent, he was subject to searching cross-examination to test his credibility; that what he did as a public officer during the course of his investigation of this transaction, could not be said to be irrelevant; that on such cross-examination, in revealing the fact that he 'didn't believe Handy because he told me three different stories' (129), he opened himself to a full inquiry as to all facts which might disclose further bias; that his testimony, taken as a whole, related to the case itself, and not to outside matters (such as those referred to by Judge Gillespie in § 344 of his work, op. cit.); and that the rebuttal testimony of the circuit judge was properly received in evidence.

And, finally, may we say this: it would have been most unfair to the prosecution, had the trial court ruled out the testimony of the circuit judge, for in that event the jury would have been left with the impression that the former attorney general had communicated Handy's statement to the grand jury officer, and that he had rejected it, or done nothing about it.

Moreover, this question was not properly raised in its federal aspect, and the court below did not so decide it.

1. When the circuit judge was produced as a witness (150), counsel first objected to his testimony (151) 'on the ground that the question put to the witness seeks to impeach a witness on a collateral matter', and he proceeded to argue the point (151-152). His further objections were also based on standard rules of evidence.

When the testimony of the circuit judge had been received, counsel for the petitioner moved for a declaration of mistrial, first, on the ground that his rights had been

seriously prejudiced by the question put to him on cross-examination, in relation to Senator Hooper; second, because of the prosecutor's repeated reference to Hooper and others (154). He also renewed his motion for a continuance of the trial on the ground of a change of date of the offense set forth in the information (Question II, ante.). And he finally moved for a mistrial (155)

> "on the grounds that the constitutional rights of this defendant guaranteed to him by the due process clause of the Constitution of the United States . . . has been violated".

But he did not specify with clear precision just what constitutional rights had been denied. Certainly, he did not claim that the testimony of the circuit judge had denied him due process of law.

2. Nor did counsel for petitioner raise the federal question in his application for leave to appeal (213), for in that document it is merely averred:

> "48. The court erred in permitting special prosecutor to call Judge Leland W. Carr to give rebuttal testimony on purely collateral matters developed on cross-examination by the special prosecutor".

3. The same errors were assigned when the appeal had been granted)241), and counsel did not claim that petitioner had thus been denied due process.

4. If the point was raised on application for rehearing (426-428), it was presented to the court only in a general way (428), and it came too late.

VII

Conclusion.

We, therefore, respectfully submit, on the several grounds asserted in this brief, that the petition for a writ of certiorari to the Supreme Court of the State of Michigan should be denied.

Respectfully submitted,

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APPENDIX

Appendix A

Defendant's Proposed Interrogation of the Jury.

State of Michigan

In the Circuit Court for the County of Ingham

People of the State of Michigan,
Plaintiff,

vs.

Floyd Fitzsimmons,
Defendant,

PROPOSED INTERROGATION OF THE JURY

Comes now Floyd Fitzsimmons by his attorneys, Charles Gore and Fred R. Walker, and respectfully request that the Court interrogate the jury respecting their qualifications as follows or to permit counsel for the defendant to interrogate them.

a. Do you have any feeling against a person because that person has earned his living by the promoting of prize fights or other sporting activities?

b. Do you have any feelings against horse racing, dog racing or persons interested therein or connected with the promotion thereof?

c. Do you have any feeling against a person or persons who indulge in the playing of poker or other card games for a pastime or for stakes?

d. What newspapers have you ordinarily read?

e. Since the Carr grand jury has been operating have you followed its progress in other newspapers, and if so, what papers?

f. Have you followed the newspaper reports of the activities of the Carr grand jury?

g. Do you recall having read of any action of the Carr grand jury respecting the defendant?

h. Do you recall having read in a newspaper of the issuance of a warrant for the arrest of the defendant?

i. Do you recall having read in any newspaper of the preliminary examination of the defendant on this charge?

j. Have you heard over the radio or from other persons any reports with respect to the action of the Carr grand jury in issuing the warrant for the arrest of the defendant?

k. Have you followed the activities of the Carr grand jury by means of radio reports?

l. Do you have any opinion as to the guilt of a citizen who has been charged with a crime by the Carr grand jury?

m. Have you any feeling that a citizen must be guilty just because the Carr grand jury has caused his arrest?

n. From what you have heard or read would you be likely to have any feeling against a citizen charged with crime by the Carr grand jury?

o. From what you have heard or read would you be likely to have any feeling in favor of the prosecution in a case originating with the Carr grand jury?

p. Would the circumstances that the warrant in this case was issued by Judge Carr of this court and the case is being prosecuted by prosecutors who are associated with that judge incline you to favor the prosecution?

q. From what you have read in the newspapers or heard on the radio or from any discussion you have heard would you be able, as you now sit in the jury box to presume that the defendant is innocent of the crime charged against him?

r. Should you be chosen as a juror, you will be instructed that you must find the defendant innocent unless proven guilty to your satisfaction beyond a reasonable doubt; in weighing that question would you consider the fact as evidence against the defendant that he has been charged with this crime by the Carr grand jury?

s. Would you likely be influenced by anything that you have read or heard as to the Carr grand jury and its activities in arriving at your verdict in this case?

t. Do you think you might be influenced in arriving at your verdict in this case by any statement purported to have been issued by Mr. Sigler or Judge Carr which you have read in the daily press or have heard quoted on the radio?

u. Have you read in the newspapers or heard on the radio or from other persons the account of the death of Warren G. Hooper?

v. Did you read of or hear of any of alleged statements of Judge Carr or Mr. Sigler as to the claimed motives of the persons alleged to be responsible for the death of Hooper?

w. Do you believe those statements?

x. Do you now believe those statements?

y. Would those statements of Judge Carr and Mr. Sigler even though they have submitted to the public no bit of evidence to justify them be likely to influence you in any way in this case?

z. If you are satisfied that the defendant is innocent, would you be embarrassed to return a verdict of not guilty because of the notoriety that has attended the handling of the Carr grand jury?

aa. If you are satisfied that the defendant is innocent of the charges here made would you hesitate or be unwilling to return a verdict of not guilty for fear of criticism from persons in your community?

bb. If you find the testimony evenly balanced would you hestitate to give the defendant the benefit of the persumption of innocence and find him not guilty?

cc. If it should appear that the only testimony against this defendant is the word of one man would you be inclined to give his testimony greater weight than that offered in behalf of the defendant because that witness was called or produced by the prosecution?

dd. Would you have any feeling against any person who engaged or has engaged in lobbying?

ee. Have you been interested in politics; if so, to what extent and on behalf of what party?

ff. Would you consider that witnesses who are produced by the prosecution should be believed in preference to witnesses produced in behalf of the defendant just because they are called or produced by prosecutors representing the Carr grand jury?

gg. Do you have any feeling that because a man has been charged with a crime and is forced to defend himself at a public trial that he must be guilty or he would not have been charged with the commission of an offense or crime?

Respectfully submitted

Charles W. Gore
Fred R. Walker